Supreme Court, U.S.
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No. _____

In The

Supreme Court of the United States

GENE VERNAL LODERMEIER,

Petitioner,

v.

ROBERT DOOLEY, Warden,

Respondent.

On Petition For Writ Of Certiorari To The Eighth Circuit Court Of Appeals

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

I

WHETHER ACTUAL JUDICIAL BIAS MUST STEM FROM AN EXTRAJUDICIAL SOURCE IN ORDER TO VIOLATE DUE PROCESS.

II

WHETHER AN ALLEGED DEATH THREAT TO A TRIAL JUDGE IS SUFFICIENTLY EGREGIOUS TO CONCLUDE THAT AN APPEARANCE OF BIAS IS PRESENT THEREBY VIOLATING DUE PROCESS.

III

WHETHER A SENTENCING JUDGE WHO STATED THAT ADMITTEDLY FALSE EVIDENCE "REINFORCES" HIS SENTENCE VIOLATED DUE PROCESS.

PARTIES TO THE PROCEEDING IN THE EIGHTH CIRCUIT COURT OF APPEALS

Petitioner, Gene Lodermeier, is a state prisoner seeking federal habeas corpus relief. Respondent, Robert Dooley, was the Warden of the state correctional facility wherein Petitioner was housed when the original federal petition for writ of habeas corpus was filed. Subsequent to that date, however, a new warden has been appointed to that position.

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II. THE EIGHTH CIRCUIT'S OPINION DETERMINING THAT AN ALLEGED DEATH THREAT TO A TRIAL JUDGE IS NOT SUFFICIENTLY EGREGIOUS TO CONCLUDE THAT AN APPEARANCE OF BIAS IS PRESENT AND VIOLATES DUE PROCESS ALSO CONFLICTS WITH THIS COURT'S HOLDINGS IN *MURCHISON, MAYBERRY,* AND *TAYLOR*

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PETITION FOR WRIT OF CERTIORARI

Gene Lodermeier ("Lodermeier") respectfully prays that a Writ of Certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Eighth Circuit filed in this proceeding on October 22, 1999, in order to reverse its decision relative to judicial bias and unfair sentencing.

OPINIONS BELOW

The opinion of the South Dakota Supreme Court reviewing the state writ of habeas corpus in *Lodermeier v. Class* was reported at 555 N.W.2d 618 (S.D. 1996) and appears in the Appendix (App. 23). The memorandum of the District Court dated January 12, 1999, appears in the Appendix (App. 1). As the Eighth Circuit Panel affirmed the district court in all respects, there is no opinion to place in the Appendix.

JURISDICTIONAL STATEMENT

On October 26, 1988, a jury found Lodermeier guilty of three counts of grand theft and three counts of possession of property with altered serial numbers. He was sentenced to 45 years in the South Dakota State Penitentiary. Lodermeier appealed his conviction to the South Dakota Supreme Court which affirmed. *State v. Lodermeier*, 481 N.W.2d 614 (S.D. 1992).

Lodermeier filed a state petition for writ of habeas corpus. Contained within that petition are the three arguments contained within this Petition. The writ was quashed in 1996 and Lodermeier appealed to the South Dakota Supreme Court which affirmed.

Lodermeier then filed a federal petition for writ of habeas corpus. Contained within that petition are the three arguments contained within this Petition. Judge John Jones quashed Lodermeier's writ and issued a memorandum opinion dated January 14, 1999, in which he explained his reasons for doing so. Lodermeier appealed to the Eighth Circuit Court of Appeals which affirmed, in an unpublished opinion, on October 22, 1999. Lodermeier filed a Petition for Rehearing and Suggestion for Rehearing En Banc dated November 4, 1999. By Order filed on November 23, 1999, the Eighth Circuit denied said Petition.

CONSTITUTIONAL PROVISIONS INVOLVED

1. Fourteenth Amendment, Section 1, to the United States Constitution.

"No State shall make or enforce any law which shall . . . deprive any person of life, liberty, or property, without due process of law . . . "

2. Sixth Amendment to the United States Constitution

"In all criminal prosecutions, the accused shall . . . have the assistance of counsel for his defense."

STATEMENT OF THE CASE

Lodermeier seeks this Court's review of constitutional questions passed upon by the Supreme Court of the State of South Dakota and the United States District Court for the State of South Dakota, Southern Division, which were affirmed by the Eighth Circuit without opinion. Lodermeier timely raised these constitutional questions in his state and federal petitions for writ of habeas corpus. The State Supreme Court entered judgment on these questions in its Opinion filed November 13, 1996. The District Court entered judgment on these questions in its Memorandum Opinion filed January 13, 1999. Finally, the Eighth Circuit affirmed the District Court in a Judgment dated October 22, 1999.

Although Judge Hurd was only scheduled to rule on pre-trial motions, he eventually presided at Lodermeier's trial. During those pre-trial hearings, Judge Hurd made several statements. At a motion hearing on June 13, 1988, he stated, "everybody knows [Lodermeier] deals in stolen property, including every cop in town." June 13, 1988, Motions Hearing at 14, 20 (hereinafter MH). "[Lodermeier] doesn't steal it himself. He likes to buy it," and "it's getting more and more what we are dealing with here is an individual who does in fact deal in stolen property." *Id.* at 18-9. "I think this guy is a guy that deals in stolen property," and *"I think he's whistling past the graveyard after all these charges he's going to find a Judge that doesn't think that [he is guilty]. Probably be some Judges that won't say it, just think it."* *Id.* at 20-1 (emphasis added). At a bond hearing Judge Hurd, after weighing different factors, stated, "I think, given that, there is a high[ ] likelihood that the State will obtain a conviction in this

case." August 23, 1988, Bond Hearing at 4 (hereinafter BH).

Lodermeier was originally released on bond. Settled Record 87-3879 (hereinafter SR), 3, SR 88-541, 3, SR 88-1117, 4. While released on bond the State brought forth allegations that Lodermeier had placed a "contract" on the life of eight persons, including Judge Hurd. August 8, 1988, BH at 5. Based upon this information, Lodermeier's bail was revoked and reset at $1,000,000.00. SR 88-541, 31. Ten subsequent bond hearings occurred, all but two in front of Judge Hurd. Much of the testimony centered around a "hit-list." August 8, 1988, BH at 5. Judge Hurd ordered Lodermeier to be held without bail until trial. A grand jury was called to investigate the "hit list," but no indictment was returned. Habeas II Transcript at 54, 73.

The news coverage of Lodermeier's bond hearings was extensive. Media members attended each bond hearing and presented arguments regarding a right to access the proceedings. August 26, 1988, BH at 28; August 30, 1988, BH. The local media reported about Lodermeier's case on a daily basis and much of it was inflammatory. For example, in the August 4th *Sioux Falls Argus Leader* a reporter wrote, "Lodermeier gained notoriety in 1974 when his 25-year-old wife, Ella Beth, was reported missing from the couple's home. Police interrogated him in the case, which remains open." SR 88-541, 15. Five days later he reported, "A Sioux Falls man held on $1 million bond wanted to hire a hit man and talked of making two men disappear, a prosecutor's witness testified Monday . . . Police interrogated him as a suspect [in his wife's disappearance]. His wife has never been found." SR 88-541, 78. The story quoted Judge Hurd: "this defendant

was giving consideration to hire somebody to have somebody killed." SR 88-541, 79. The paper summarized Ella Beth and another alleged pipe bombing. SR 88-541, 80-1,83-7. These events made an impact on Judge Hurd who referred to the hit list at sentencing: "[T]here is some evidence that the defendant engaged in conversation . . . about having this Court killed." Sentencing Transcript at 25 (hereinafter ST).

The State was so concerned about the above facts that it drafted a document containing a waiver of Judge Hurd's bias for Lodermeier to sign. So concerned was Lodermeier's trial counsel about "cover[ing] [his] ass," Habeas I at 20, that he too drafted a waiver for Lodermeier to sign. Based upon advice from his trial counsel, Lodermeier signed both "Statements" dated August 30, 1988 and October 7, 1988.[1] Trial counsel advised Lodermeier to sign both waivers despite the fact that Judge Hurd himself, at a hearing concerning a motion for new trial, stated, "The fact is I'm not too sure I shouldn't have gotten off the case before." October 28, 1991, MH at 16.

Lodermeier claimed that Judge Hurd's presence at trial violated his due process rights because he was

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[1] "I, Gene Lodermeier . . . have been advised by my attorney . . . that the State is desirous of exercising its recusal right and recusing Judge Heege from presiding at the trial in the above-mentioned criminal matter . . . I am further aware that Judge Hurd . . . heard certain evidence which alleged that Judge Hurd was one of several people included in a 'hit list' that I had allegedly prepared . . . It is nevertheless my desire that Judge Hurd sit as the Judge in my trial . . . I therefore waive any legal arguments I may have to have Judge Hurd removed from the case . . . "

actually biased. Lodermeier also claimed that his trial counsel was ineffective for advising him to sign a document waiving his right to a judge free from the appearance of bias.

At sentencing, the State argued that Lodermeier deserved a stiff sentence because he was dangerous. Several reasons were cited, including the fact that Lodermeier attempted to murder Sioux Falls Detective Allen Fields in 1977. ST at 7-8. In response to the State's recommendation at sentencing, Judge Hurd stated,

> "There is not, in my opinion, based upon information presented to me, sufficient evidence to charge the defendant with that offense. *But I do not totally disregard it as I totally disregard the disappearance of his wife.* Because the circumstances that give rise to making this defendant a legitimate suspect *reinforces* the opinion of this Court as to the dangerousness of the defendant. And so while I don't give it a great amount of weight I do think that it does show his dangerousness." ST at 24 (emphasis added).

Lodermeier's trial counsel did not object to Judge Hurd relying on the above-noted false accusations.

Fields, a 28-year veteran who investigated literally thousands of crimes, testified at the state writ hearing. He stated that any claim that Lodermeier tried to kill him with a pipe bomb was false. Writ II at 14-15, 23. He had participated in the investigation and reviewed the entire police file. *Id.* at 23. Lodermeier claimed his trial counsel was ineffective for failing to object.

REASONS FOR GRANTING THE WRIT

ACTUAL AND IMPLIED BIAS

In rejecting Lodermeier's actual and apparent judicial bias arguments the South Dakota Supreme Court wrote, "This actual bias must come from an extrajudicial source, which means the judge's rulings were based on something learned other than at trial." *Lodermeier*, 555 N.W.2d at 626 (citing *State v. Lohnes*, 432 N.W.2d 77, 83 (S.D. 1988)).[2] As for the implied bias, although trial counsel did not object to the false statement he did argue that the State's description of Lodermeier as a dangerous person was incorrect. And, assuming no objection was made, "the factual scenarios in the [implied bias] Supreme Court cases [Lodermeier] cites are much more egregious than any implied bias alleged in this case." *Lodermeier*, 555 N.W.2d at 626 n.6.

Lodermeier presented the same claims to the District Court. The District Court rejected the actual bias argument by relying extensively upon *Liteky v. United States*, 510 U.S. 540 (1994); due process could not have been violated because the source of any bias was not extrajudicial. District Court's Opinion at 23-24. The implied bias argument was rejected also. The decision to advise Lodermeier to waive his rights to a biased judge was "reasonably justifiable strategy made by an experienced attorney and knowingly assented to by Lōdermeier." *Id.* at 17. As

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[2] The *Lohnes* Court relied upon *State v. Smith*, 242 N.W.2d 320, 324 (Iowa 1976) which, in turn, relied upon *Antonello v. Wunsch*, 500 F.2d 1260, 1262-63 (10th Cir. 1974). The latter case applied 28 U.S.C. sec. 144 and relied upon *Berger v. United States*, 255 U.S. 22 (1921).

for the merits of the ineffective assistance claim, "the state court proceedings did not result in a decision contrary to, or involve an unreasonable application of, clearly established federal law . . . " *Id.* at 18.

There is no question that an impartial judge in a criminal trial is a fundamental right. Beginning with *Tumey v. Ohio*, 273 U.S. 510, 523 (1927), this Court held that a defendant is denied due process if a trial judge has a "direct, personal, substantial, pecuniary interest in reaching a conclusion against [the defendant]." Basically, a judge cannot "be a judge in his own case [or be] permitted to try cases where he has an interest in the outcome." *In re Murchison*, 349 U.S. 133, 146 (1955). Another "critical factor . . . is the character of [the judge's] response to misbehavior during the course of the trial." *Taylor v. Hayes*, 418 U.S. 488, 503 n.10 (1974). Although there are probably other factors, reviewing courts should look for a judge's pecuniary interest or whether the trial judge "was an activist seeking combat." *Mayberry v. Pennsylvania*, 400 U.S. 455, 465 (1971).[3]

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[3] Examples of actual bias include: trial judge, who later presided at the attorney's contempt trial, had a personal interest because he became "personally embroiled" with the attorney, *Offutt v. United States*, 348 U.S. 11 (1954); a trial judge, presiding over an action against a civil rights activist, had a personal interest because he made racial remarks and was the losing party in another civil rights suit brought by the same activist, *Johnson v. Mississippi*, 403 U.S. 212 (1971); a trial judge, who later conducted the contempt proceeding, had a personal interest because he got into a running controversy with an attorney, *Taylor*, 418 U.S. 488; a justice of the peace had a financial interest because he was paid $5.00 for each warrant issued and no other salary, *Connally v. Georgia*, 429 U.S. 245 (1977); and a state

The above cases characterize the possible bias as "actual," but there is also another form of bias. "The appearance of bias [line of cases] . . . goes back at least as far as *Murchison* . . . " *Walker v. Lockhart*, 726 F.2d 1238, 1244 (8th Cir. 1984) (*en banc*). Actual bias will be presumed where there is "such a likelihood of bias or an appearance of bias that the judge was unable to hold the balance between vindicating the interests of the court and the interests of the accused." *Taylor*, 418 U.S. at 501. This bias "may sometimes bar trial judges who have no actual bias and who would do their very best to weigh the scales of justice equally between contending parties." *Murchison*, 349 U.S. at 136. In short, in the absence of evidence proving actual bias, a "presumption" of bias will occur if some other strong "biasing influence" is present. *Del Vecchio v. Illinois Dept. of Corrections*, 31 F.3d 1363, 1375 (7th Cir. 1993) (en banc). A "strong biasing influence" could be a defendant's comments or actions toward the judge that cast "such a potential for bias as to require disqualification." *Mayberry*, 400 U.S. at 466-67.[4]

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supreme court justice "judge[d] his own case" because he filed similar actions and received settlements on the same issue before the court on appeal. *Aetna Life Ins. Co. v. Lavoie*, 475 U.S. 813 (1986).

[4] Examples of cases where actual bias was presumed include: a conviction was reversed where the judge acted as a one-person grand jury and trier-of-fact when considering possible contemptuous conduct previously committed before him, *Murchison, supra*; a village mayor was responsible for village finances, a major part of which were derived from criminal fines, and, therefore, a possible temptation to boost the town's finances was present, *Ward v. Monroeville*, 409 U.S. 57 (1972); a conviction was reversed where a trial court, who was

Based upon the above caselaw, it is clear that the primary factor is the *existence* of bias and not the *source* of the bias. If the extrajudicial source rule were the rule, then *Taylor, Mayberry,* and *Murchison* would certainly be overruled because all three convictions were reversed despite the source of the bias being intrajudicial.

The extrajudicial source rule originated in the opinions of this Court interpreting federal judicial disqualification statutes, 28 U.S.C. secs. 144 & 455, but its use has never been extended to constitutional interpretation. The prior statute excuses any judge with a "personal bias of prejudice." This Court held that "the alleged bias and prejudice to be disqualifying must stem from an extrajudicial source and result in an opinion on the merits on some basis other than what the judge learned from his participation in the case." *United States v. Grinnell Corp.*, 384 U.S. 563, 583 (1966); *Berger*, 255 U.S. at 31. If any judge's "impartiality might reasonably be questioned," then, pursuant to section (a) of sec. 455, the judge "shall disqualify himself." This Court recently held that disqualification is not necessary when a judge's negative opinions of a party are generated intrajudicially, unless the bias is "so extreme as to render fair judgment impossible." *Liteky, supra.*

Even a cursory review of the above cases indicates that the South Dakota Supreme Court and District Court created new law in disregard of this Court's caselaw that indicates that the *source* of judicial bias is irrelevant. In

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viciously, verbally abused, later found the defendant guilty of contempt, *Mayberry*, 400 U.S. 455.

effect, the lower Courts took this Court's statutory interpretation caselaw – *Berger, Grinnell* and *Liteky* – and vaulted it to a constitutional requirement.

Further evidence of this mistake is found in other caselaw. The vast majority of other state courts interpreting this Court's due process disqualification cases do not require the source of the bias to be extrajudicial.[5] However, there has been occasional confusion as in this case. For example, state appellate courts have held that judicial bias must be extrajudicial, and both courts made the same mistake as the South Dakota Supreme Court by relying upon this Court's cases interpreting federal recusal statutes. *See Kemp v. State*, 846 S.W.2d 289, 305-06 (Tex.Cr.App. 1992) (quoting *Grinnell Corp, supra*) ("[I]t is beyond rational dispute that before alleged bias becomes sufficient to warrant the disqualification of a judge, it 'must stem from an extrajudicial source and result in an opinion on the merits in some basis other than what the judge learned from the participation in the case.' "); *State v. Wise*, 879 S.W.2d 494, 523 (Mo.banc. 1994) (citing *Liteky*,

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[5] *See State v. Hill*, 848 P.2d 1375, 1384 (Ariz. 1993); *People v. Robinson*, 874 P.2d 453, 459 (Colo.App. 1993); *State v. Steele*, 348 So.2d 398, 401 (Fla.App. 1977); *Carey v. State*, 405 A.2d 293, 295-96 (Md. 1979); *In re Bernard*, 408 A.2d 1279, 1282 (Me. 1979); *Crampton v. Michigan Dept. of State*, 235 N.W.2d 352, 354-57 (Mich. 1975); *Payne v. Lee*, 24 N.W.2d 259, 264 (Minn. 1946); *Matter of Nakel*, 411 S.E.2d 159, 164 (N.C.App. 1991); *Fields v. State*, 923 P.2d 624, 636 (Okl.Cr. 1996); *State v. Garza*, 865 P.2d 463, 465 (Or.App. 1994); *Goodheart v. Casey*, 565 A.2d 757, 761 (Pa. 1989); *Matter of Throneberry*, 754 S.W.2d 633, 636 (Tenn.Cr.App. 1988); *Welsh v. Commonwealth*, 416 S.E.2d 451, 459 (Va.App. 1992); *Louk v. Haynes*, 223 S.E.2d 780, 790 (W.Va. 1975); *State v. Walberg*, 325 N.W.2d 687, 692-95 (Wis. 1982).

supra) ("A judge ruling on postconviction claims is not biased or prejudiced simply because the judge presided at trial."). There have been many cases decided by Circuit Courts of Appeal, but none could be found in which the court conducted a due process analysis relative to judicial bias and required the bias to be extrajudicial. Indeed, as the Second Circuit, sitting *en banc*, noted, "The gravamen of a claim of denial of a fair trial due to judicial bias does not depend on the source of the bias or the manner of its manifestation." *Daye v. Attorney General*, 696 F.2d 186, 197 (2d Cir. 1982) (*en banc*).[6] Considering that this Court's interpretation of statutory recusal laws requires extrajudicial bias and constitutional recusal does not there will be more defendants claiming a denial of due process rather than requesting statutory recusal. This alone perhaps merits review by this Court.

Because none of the lower courts went past an extrajudicial analysis, the substantive merits were never reached. This analysis is not housed within an ineffective assistance argument because actual bias cannot be waived. *Summers v. Singletary*, 119 F.2d 917, 920 (11th Cir. 1997); *United States v. Murphy*, 768 F.2d 1518, 1540 (7th Cir. 1985). Lodermeier contends that Judge Hurd, who expressed an opinion about Lodermeier's guilt in the face

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[6] *See also United States v. Pina*, 844 F.2d 1, 13-14 (1st Cir. 1988); *Haines v. Liggett Group, Inc.*, 975 F.2d 81, 98 (3d Cir. 1992); *United States v. Brown*, 539 F.2d 467, 469-70 (5th Cir. 1976); *Nicodemus v. Chrysler*, 596 F.2d 152 (6th Cir. 1979); *Del Vecchio*, 31 F.3d at 1371-75; *Walberg v. Israel*, 766 F.2d 1071, 1076-77 (7th Cir. 1985); *Sandstrom v. Butterworth*, 738 F.2d 1200, 1211-14 (7th Cir. 1984); *Dyas v. Lockhart*, 705 F.2d 993, 996-97 (8th Cir. 1993); *Nichols v. Sullivan*, 867 F.2d 1250, 1254 (10th Cir. 1989).

of an alleged death threat, presumptively became an activist with a direct, personal and substantial interest in reaching a conclusion against him. *See*, e.g., *United States v. Murdock*, 290 U.S. 389 (1933) (judge's comment that the government had sustained its burden was improper); *Quercia v. United States*, 289 U.S. 466 (1933) (judge's comment that defendant's hand wringing indicated that he was lying was improper).

The lower courts' conclusions that the facts of this case did not rise to a sufficient level to create an appearance of bias, thereby relieving Lodermeier's trial counsel from the mistake of failing to advise Lodermeier that he should not waive his right to a judge free from the appearance of bias, are clearly erroneous. Trial counsel should not only have objected, but he should have attempted to have Judge Hurd removed. Although not binding, other courts have determined that these very same type of biasing factors presuppose an appearance of bias thereby meeting the standard of the federal recusal statutes. *See United States v. Greenspan*, 26 F.3d 1001, 1107 (10th Cir. 1994) (trial court should have recused himself after a death threat by defendant); *United States v. Cerrella*, 529 F.Supp. 1373 (E.D.Fla. 1982) (*id.*). In fact, the appearance of bias in this case is far worse than in *Murchison* or *Ward* where this Court found the appearance of bias because the bias there was the system itself. Here, as in *Mayberry*, there is a "confrontation" between the judge and the defendant. A reasonable person who heard Judge Hurd state his opinion regarding Lodermeier's guilt and then saw him preside over Lodermeier's trial, a man who

allegedly hired a hit-man to kill him, would most certainly have to harbor doubts as to Judge Hurd's impartiality. In fact, Judge Hurd, in hindsight, questioned his participation. Clearly, the death threat casts such a horrible shadow upon the trial as to warrant a conclusion that trial counsel's advice to waive the bias fell below the standard for reasonable counsel thereby causing an unfair trial. *Strickland v. Washington*, 466 U.S. 668, 687-88 (1984); *Lockhart v. Fretwell*, 506 U.S. 364, 369 (1993).

FALSE EVIDENCE AT SENTENCING

A sentencing judge cannot rely upon false information. *Townsend v. Burke*, 334 U.S. 736 (1948); *United States v. Tucker*, 404 U.S. 443 (1972). The South Dakota Supreme Court did not conclude that Lodermeier's allegation that *Tucker* and *Townsend* were violated was meritorious. Instead, it noted that Judge Hurd only "gave token consideration to the pipe-bombing incident . . . " *Lodermeier*, 555 N.W.2d at 623. As such, trial counsel did not need to object. The District Court relied exclusively upon this holding. District Court's Opinion at 19. These two opinions severely narrow the legal definition of "reliance."

This Court's opinions define "reliance" very broadly. In *Townsend*, this Court held that due process was violated where a sentencing court mentioned that Townsend had been convicted of eight prior convictions, two of which were later determined to have been not guilty findings. *Townsend*, 334 U.S. at 739-40. This Court in *Tucker* held that a sentencing judge violated Tucker's due process rights because he heard evidence from an FBI

agent about Tucker's three prior convictions, two of which were later determined to be unconstitutionally invalid. In the prior, there was no evidence the sentencing court did more than state the number of Townsend's convictions, and in the latter the only evidence that the sentencing court relied upon the two invalid convictions was that it *heard* the testimony and then issued a sentence. This Court characterized the "reliance" in *Tucker* as "specific consideration" because he heard the testimony. *Tucker*, 404 U.S. at 447.[7] Therefore, the definition of "reliance" gleaned from *Townsend* and *Tucker* is that a sentencing court need only *hear* the false evidence and then issue a sentence. This Court has never gone so far as to hold that a sentencing court must *state* in the record that he relied upon the false information.

In fact, even if the latter standard were the rule, the sentencing court in this case still relied upon false information. Judge Hurd's reliance met the *Townsend-Tucker* rule and actually went much further. He stated that the allegation "reinforces" his sentence. This is more than the "specific consideration" given in *Tucker* and it is clearly not a "token consideration" as suggested by the South Dakota Supreme Court. Judge Hurd used this false information as a basis for concluding that Lodermeier is a danger to society, ST at 23, thereby warranting a stiff

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[7] *See also Ryder v. Morris*, 752 F.2d 327, 329 (8th Cir. 1985). The Eighth Circuit reversed Ryder's sentence after the sentencing court merely noted in the record that he received a copy of the presentence report which was later determined to contain a false accusation that the defendant was responsible for the death of this wife. There was no evidence that the trial court even read the report.

sentence. *Id.* at 26. Judge Hurd would not have been able to substantiate a stiff sentence without the false information.[8] Therefore, in light of the fact that there was no other evidence that Lodermeier was dangerous, there is a reasonable probability that due to counsel's deficient performance the sentence was rendered fundamentally unfair. *Strickland, supra; Fretwell, supra.*

CONCLUSION

For the foregoing reasons, the petition for writ of certiorari should be granted.

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[8] There was no mention that the stolen machinery in this case supported a contention that Lodermeier posed a danger to others because, as Judge Hurd stated, "the nature of the offense [of which Lodermeier was convicted] itself is not as serious as a lot of offenses because it is primarily a crime of property." August 23, 1988 BH at 3.

APPENDIX

UNITED STATES DISTRICT COURT

DISTRICT OF SOUTH DAKOTA

SOUTHERN DIVISION

GENE VERNAL LODERMEIER,	*	CIV 98-4028
Petitioner,	*	MEMORANDUM OPINION AND ORDER OF DISMISSAL
-vs-	*	
ROBERT DOOLEY, Warden for Springfield Correctional Facility,	*	(Filed Jan. 13, 1999)
Respondent.	*	

Petitioner, Gene Lodermeier, filed a Petition for Writ of Habeas Corpus pursuant to 28 U.S.C. § 2254. Petitioner is represented by counsel in this action. The petition was served upon respondent and he filed an answer and moved to dismiss the petition. Doc. 7. Petitioner filed a Motion for Evidentiary Hearing. Doc. 16. The Court heard oral argument on the motions on August 17, 1998, with petitioner appearing by his counsel, David R. Gienapp and David M. Hosmer and with respondent appearing by his counsel Timothy G. Bartlett. The Court took the motions under advisement at the time of the hearing. For the reasons set forth below, the Court will deny petitioner's Motion for Evidentiary Hearing and deny the Petition for Habeas Corpus under 28 U.S.C. § 2254.

I. Background

On October 26, 1988 petitioner was convicted by a jury of three counts of possession of stolen property and three counts of possession of property with altered serial numbers in violation of the laws of the State of South Dakota. Petitioner's convictions involve three articles of personal property, a Clark Model 642 Bobcat skid-steer loader (large Bobcat), a Model 116 John Deere lawn tractor (lawn tractor), and a Model M371 Melroe Bobcat (small Bobcat). On November 2, 1988, petitioner entered a guilty plea to a Habitual Offender Information. The Honorable Richard D. Hurd, circuit court judge, sentenced petitioner to a total of forty-five years' imprisonment in the South Dakota State Penitentiary. The Final Judgments were entered by Judge Hurd on August 15, 1989. Petitioner was represented at trial and sentencing by Mr. John Schlimgen of Sioux Falls, South Dakota.

Petitioner, represented by Mr. Lee Tappe, appealed his convictions to the South Dakota Supreme Court. The South Dakota Supreme Court affirmed petitioner's convictions on February 26, 1992. *State v. Lodermeier*, 481 N.W.2d 614 (S.D. 1992) (*Lodermeier I*).

Petitioner filed a pro se application for writ of habeas corpus with the state circuit court in 1993 (hereinafter referred to as "the state habeas court"). The Honorable Judith K. Meierhenry, circuit court judge, presided over the habeas proceedings. After petitioner's court appointed attorney was allowed to withdraw as petitioner's attorney, petitioner hired Mr. David Hosmer to represent him. With the assistance of Mr. Hosmer, petitioner filed an amended application for writ of habeas corpus in

August 1995. Judge Meierhenry conducted two hearings on the merits of petitioner's state habeas application. Judge Meierhenry denied petitioner's amended application for writ of habeas corpus in November 1995.

Petitioner appealed the denial of his habeas application to the South Dakota Supreme Court. On November 13, 1996, the South Dakota Supreme Court affirmed the denial of petitioner's amended application for writ of habeas corpus. *Lodermeier v. Class*, 555 N.W.2d 618 (S.D. 1996) (*Lodermeier II*).

Petitioner filed the present petition for writ of habeas corpus pursuant to 28 U.S.C. § 2254 on February 5, 1998. Petitioner asserts the following grounds for the issuance of a writ of habeas corpus in the present petition:

> (1) Trial counsel rendered ineffective assistance of counsel in violation of the Sixth Amendment in four respects:
>
> > (a) trial counsel failed to investigate and bring the lawn tractor to a suppression hearing regarding the lawn tractor to prove the police lied;
> >
> > (b) trial counsel improperly advised petitioner to waive his right to object to Judge Hurd's implied bias;
> >
> > (c) trial counsel presented an improper defense; and
> >
> > (d) trial counsel failed to object to the trial judge's sentence which was based upon erroneous facts.
>
> (2) Outrageous government conduct violated the Due Process Clause of the Fourteenth Amendment;

(3) The State's failure to disclose the name of the confidential informant violated the Due Process Clause of the Fourteenth Amendment;

(4) Judge Hurd's actual bias violated the Due Process Clause of the Fourteenth Amendment; and

(5) The indictments were defective and void for failing to allege an essential element of the charged crimes in violation of the Sixth Amendment.

In his Answer, respondent first asserted the petition was barred by the one-year statute of limitations set forth in 28 U.S.C. § 2244(d)(1) (Supp. 1997). Respondent later withdrew this motion to dismiss. Doc. 13. In his second motion to dismiss, respondent contends the petition contains both exhausted and unexhausted claims. Respondent argues petitioner's first claim of ineffective assistance of counsel was raised only in the context of a claim for outrageous government conduct and police misconduct, rather than as a claim for ineffective assistance of counsel. Respondent claims a new basis for ineffective assistance, not presented to the state courts, is not exhausted. In the alternative, respondent's third motion to dismiss is based upon procedural default as to the first issue in the petition because petitioner did not fairly present the constitutional dimension, i.e., ineffective assistance of counsel, of this issue to the state courts and because petitioner did not raise this issue in the state habeas corpus proceedings. Respondent lastly contends petitioner's petition should be denied on the merits.

II. Decision

A writ of habeas corpus may be granted to a person in custody pursuant to the judgment of a state court "only on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States." 28 U.S.C. § 2254(a). The revised legal standard for reviewing § 2254 petitions contained in 28 U.S.C. § 2254(d) (Supp. 1997) apply to this case. *Lindh v. Murphy*, 521 U.S. 320, ___, 117 S.Ct. 2059, 2063 (1997) (stating that the new § 2254(d) applies to non-capital cases filed after the statute's enactment). An application for writ of habeas corpus cannot be granted to petitioner on any claim adjudicated on the merits in state court proceedings unless petitioner can show that the state court's decision (1) "was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; " or (2) "was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceedings." 28 U.S.C. § 2254(d) (Supp. 1997).

A. Motion for Evidentiary Hearing

Petitioner filed a Motion for Evidentiary Hearing. Doc. 16. Respondent asserts petitioner is not entitled to an evidentiary hearing because the claim of ineffective assistance of counsel for failure to prepare for the suppression hearing involving the lawn tractor is either unexhausted or procedurally defaulted. As explained in detail below, the Court concludes petitioner procedurally defaulted this claim and it is, therefore, unreviewable by

this Court. Therefore, petitioner's motion for evidentiary hearing on this issue will be denied.

Even if this claim were not procedurally defaulted, the Court would deny petitioner's motion. The amendments to 28 U.S.C. § 2254 enacted by the Antiterrorism and Effective Death Penalty Act of 1996 limit the situations in which an evidentiary hearing may be conducted by federal courts in habeas cases. *See* 28 U.S.C. § 2254(e)(2) (Supp. 1997).

Although the state habeas court did not specifically address this ineffective assistance claim in its memorandum decision denying the habeas petition, petitioner presented evidence in the evidentiary hearing before the state habeas court similar to the type of evidence he seeks to introduce via an evidentiary hearing in this Court. *See* Habeas Corpus transcript, May 5, 1994, p. 130, 203-11. Petitioner seeks to introduce evidence either through a witness or the actual lawn tractor to display that the officers could not have seen the hidden serial numbers to establish probable cause. Petitioner's argument amounts to an assertion that he did not fully develop the factual basis of his claim in the proceedings before the state habeas court. The Court concludes petitioner would not be able to satisfy the requirements in 28 U.S.C. § 2254(e)(2)(A) (Supp. 1997) for holding an evidentiary hearing because petitioner neither relies on a new rule of constitutional law nor relies on a factual predicate that could not have been previously discovered by the exercise of due diligence.

B. Ineffective Assistance of Counsel

Strickland v. Washington sets the standard for a claim of ineffective assistance of counsel:

> To succeed on a claim of ineffective assistance of counsel, a habeas corpus petitioner must show the following: First, the defendant must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the "counsel" guaranteed the defendant by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable.

466 U.S. 658, 687 (1984). It is clear that the fact of conviction is not indicative of ineffective assistance of counsel. *Laws v. Armontrout*, 863 F.2d 1377, 1382 (8th Cir. 1988), *cert. denied*, 490 U.S. 1040 (1989). This Court will presume attorneys provide effective assistance and will not "second-guess strategic decisions or exploit the benefits of hindsight." *Payne v. United States*, 78 F.3d 343, 345 (8th Cir. 1996).

1. Failure to Prepare for Suppression Hearing

Respondent contends petitioner's claim of ineffective assistance of counsel for failure to prepare for the suppression hearing regarding the lawn tractor is barred by the doctrines of exhaustion and procedural default.

An application for a writ of habeas corpus under 28 U.S.C. § 2254 shall not be granted unless it appears that:

> (A) the applicant has exhausted the remedies available in the courts of the State: or
>
> (B)(i) there is an absence of available State corrective process; or
>
> (ii) circumstances exist that render such process ineffective to protect the rights of the applicant.

28 U.S.C. § 2254(b)(1).

The issues of procedural default and exhaustion, as argued by respondent, are two separate inquiries. *Satter v. Leapley*, 977 F.2d 1259, 1261 (8th Cir. 1992). The Court finds the petition contains an unexhausted claim, but petitioner does not have any non-futile remedies available to him in state court. The Court will not dismiss this claim for failure to exhaust state remedies. However, petitioner has procedurally defaulted his claim for ineffective assistance of counsel for failure to prepare for the suppression hearing regarding the lawn tractor and is barred from asserting this claim in federal court.

Exhaustion. "A claim is considered exhausted when the petitioner has afforded the highest state court a fair opportunity to rule on the factual and theoretical substance of his claim." *Ashker v. Leapley*, 5 F.3d 1178, 1179 (8th Cir. 1993) (subsequent history omitted), *citing, Picard v. Connor*, 404 U.S. 270, 275-78 (1971). To exhaust a claim in state court, a petitioner must refer to a specific federal constitutional right, a particular constitutional provision, a federal constitutional case, or a state case raising a pertinent federal constitutional issue. *Ashker*, 5 F.3d at

1179. Respondent contends that in the appeal to the South Dakota Supreme Court for the denial of his state habeas petition, petitioner only referred to the unreasonable search and seizure of the lawn tractor in the context of outrageous government conduct rather than in the context of ineffective assistance of counsel.

Petitioner contends he exhausted his claim of ineffective assistance of counsel for failure to prepare for the suppression hearing by including a reference to the state habeas court's decision on the issue of collateral estoppel in his brief to the South Dakota Supreme Court.[1] After carefully reviewing the record, the Court concludes petitioner did not afford the highest state court a fair opportunity to rule on the factual and theoretical substance of this ineffective assistance of counsel claim.

Petitioner stated in his original habeas application as a ground for ineffective assistance of counsel that his trial counsel "failed to investigate, question witnesses, or secure unimpeachable on site evidence to show the falsehoods in the affidavit for search warrant to show the falsehoods in the affidavit for search warrant and invalidity of the search warrant (Exhibits XV, *supra*; & XVIII, *supra*)." *See Lodermeier v. State*, No. 19444, South Dakota Supreme Court, at pp. 21 and 195. Exhibit XVIII

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[1] Petitioner's brief to the South Dakota Supreme Court on appeal of the denial of his state habeas petition is attached as Exhibit I to Respondent's Answer, Doc. 7, in the present case. Petitioner cites to pages 38 to 40 of this brief in support of his argument that he fairly presented this ineffective assistance of counsel claim to the South Dakota Supreme Court.

referred to in his application is petitioner's affidavit. *Id.* pp. 53-70. In petitioner's affidavit he stated:

> 24. That with minimum effort defense counsel could have also shown at both [Officer] Prince and [Officer] Folkerts had lied about their viewing of the serial numbers on their warrantless search of the John Deere garden tractor;
>
> 25. That defense counsel failed to point out that Folkerts [sic] own affidavit belies Prince's testimony and the trial court's finding that he inadvertently discovered the John Deere garden tractor and also supports the above mentioned evidence that Prince's (sic) lied in his testimony that he was in my backyard to talk to me about a ladder I had reported stolen;

Id. at p. 58. The State did not mention the lawn tractor in its brief to the state habeas court in support of its motion to dismiss the petition based upon res judicata. *See Plaintiff's Response to Defendant's Motion to Dismiss for Failing to Exhaust State Remedies*, Doc. 9, Exhibit B at 5. Rather, the State argued: "A. Petitioner's application paragraph XXIII H. constitutes a challenge to the search warrant secured for the large Bobcat. This issue was fully addressed and disposed of by the State Supreme Court on direct appeal. *Lodermeier*, 481 N.W.2d at 621-25." *Id.* The state habeas court granted the State's motion to dismiss paragraph XXIII H. of the original application based upon res judicata, stating that this sub-paragraph was "substantially considered in Petitioner's direct appeal and dismissed." *Lodermeier v. State*, No. 19444, South Dakota Supreme Court, at p. 403. Therefore, the issue of ineffective assistance of counsel for failure to prepare for the suppression

hearing regarding the lawn tractor was raised before a state habeas court.

In petitioner's brief to the South Dakota Supreme Court from the denial of his state habeas petition, he included an argument that "[t]he Habeas Court incorrectly ruled that Lodermeier's [direct] appeal precluded several issues in the habeas action.Those issues include: defective indictment, statute of limitations, search and seizure, and new trial (confidential informant's identity)." Answer, Doc. 7, Exhibit I at p. 39. Petitioner did not mention the issue of ineffective assistance of counsel for failing to prepare for the suppression hearing regarding the lawn tractor. Therefore, the Court concludes petitioner failed to raise this issue before the South Dakota Supreme Court.

Before the petition is dismissed for failure to exhaust state remedies, the Court must determine whether non-futile state court remedies are available to petitioner. *Ashker*, 5 F.3d at 1180 (citation omitted). In contrast to the situation in *Ashker*, petitioner here did present the ineffective assistance of counsel claim for failing to prepare for the suppression hearing in his original application for habeas corpus relief in the state habeas court. Therefore, petitioner would not be entitled to file a second petition in state court pursuant to SDCL § 21-27-16.1. The Court did not find, and the respondent did not cite, any other avenue for relief which petitioner could pursue in state court. Therefore, despite petitioner's failure to exhaust state court remedies on this issue, the Court will not dismiss his petition for this failure because only futile remedies remain available to petitioner in state court.

Procedural Default. Although this claim will not be dismissed for failure to exhaust state remedies, it will be dismissed as procedurally defaulted. "[A] federal court may usually only consider 'those claims which the petitioner has presented to the state court in accordance with state procedural rules.' " *McCall v. Benson*, 114 F.3d 754, 756-57 (8th Cir. 1997) (*quoting*, *Abdullah v. Groose*, 75 F.3d 408, 411 (8th Cir.), *cert. denied*, 517 U.S. 1215 (1996) (citation omitted)). If a state prisoner's claims are procedurally defaulted, the federal court cannot consider such prisoner's claims unless he can demonstrate either cause and actual prejudice or actual innocence. *Bousley v. United States*, ___ U.S. ___, ___, 118 S.Ct. 1604, 1611 (1998).

Respondent correctly argues petitioner procedurally defaulted his claim of ineffective assistance of counsel because he did not raise it in his appeal to the South Dakota Supreme Court for the denial of his state habeas petition by the state habeas court. *See Graham v. State*, 328 N.W.2d 254, 255, n.2 (S.D. 1982) (holding that post-conviction petitioner waived all appeal issues not raised, briefed, and argued in compliance with SDCL 15-26A-60); *Satter*, 977 F.2d at 1262 (holding under South Dakota law petitioner procedurally defaulted insufficient evidence claim by abandoning it on appeal from denial of state habeas). In connection with his exhaustion argument, petitioner asserts he raised this issue in his brief on appeal of the denial of his state habeas petition when he challenged the trial court's dismissal of certain claims as barred by res judicata. The Court disagrees. For the same reasons discussed above regarding petitioner's failure to exhaust this issue in the state courts, the Court concludes the issue of ineffective assistance of counsel for failure to

prepare for the suppression hearing regarding the lawn tractor was abandoned on appeal. Petitioner did not mention this issue in his appeal to the South Dakota Supreme Court of the denial of his state habeas petition.

The Supreme Court has explained "the existence of cause for a procedural default must ordinarily turn on whether the prisoner can show that some objective factor external to the defense impeded counsel's efforts to comply with the State's procedural rule." *Murray v. Carrier,* 477 U.S. 478, 488 (1986). The Supreme Court has also provided some examples of "external objective impediments," such as where the factual or legal basis for a claim was not reasonably available previously or whether interference by officials made compliance impracticable. *Id.* Petitioner does not offer any explanation for why he failed to raise before the South Dakota Supreme Court his federal constitutional claim of ineffective assistance of counsel for failure to prepare for the suppression hearing regarding the lawn tractor. Both the factual and legal basis for this claim was clearly available previously as petitioner made an argument to this effect during the proceedings before the state habeas court. The Court concludes petitioner is unable to demonstrate cause for his default. Because petitioner has failed to establish cause for his procedural default, the Court need not consider the issue of prejudice. *Anderson v. White,* 32 F.3d 320, 321 (8th Cir. 1994).

"To establish actual innocence, petitioner must demonstrate that, in light of all the evidence, it is more likely than not that no reasonable juror would have convicted him." *Bousley,* 118 S.Ct. at 1611 (quotation marks and citations omitted). "It is important to note in this regard

that 'actual innocence' means factual innocence, not mere legal insufficiency." *Id.* Petitioner's claim of ineffective assistance of counsel for failure to prepare for the suppression hearing relates only to his conviction based upon the stolen lawn tractor. Based upon a careful review of the record, the Court concludes petitioner cannot demonstrate factual innocence of the crime of grand theft by receiving, retaining or disposing of stolen property, namely the lawn tractor, in violation of SDCL § 22-30A-7, or the crime of possession of property with an altered or removed serial number in violation of SDCL § 22-11-27, namely the lawn tractor. Accordingly, the Court will dismiss as procedurally defaulted the issue of ineffective assistance of counsel for failure to prepare for the suppression hearing regarding the lawn tractor.

2. Waiver of Objection to Trial Judge's Implied Bias

Petitioner states that prior to trial he was accused of attempting to hire a hit man to kill Judge Hurd at the time Judge Hurd was presiding over suppression and bond hearings in petitioner's criminal cases. Petitioner claims his trial counsel was ineffective for advising him to waive his right to object to implied bias on the part of Judge Hurd based upon this "hit man" episode. Petitioner signed two statements indicating he expressly submitted to Judge Hurd's jurisdiction despite the hit list controversy. Trial counsel testified during the state habeas proceedings that he discussed the issue of whether Judge Hurd should remain on the case with petitioner and decided Judge Hurd should remain. The South Dakota Supreme Court concluded this decision by

trial counsel was a "reasonably justifiable strategy made by an experienced trial attorney and knowingly assented to by Lodermeier." *Lodermeier II*, 555 N.W.2d at 627. The Court agrees the advice given to petitioner was a strategic decision. This claim of error will be denied because this Court must not "second-guess strategic decisions or exploit the benefits of hindsight." *Payne*, 78 F.3d at 345. Moreover, the adjudication of this claim on the merits in the state court proceedings did not result in a decision contrary to, or involve an unreasonable application of, clearly established federal law or result in a decision based on an unreasonable determination of facts. 28 U.S.C. § 2254(d).

3. Improper Defense

Petitioner contends trial counsel was ineffective because he failed to present the defense petitioner requested he present. The South Dakota Supreme Court found trial counsel was not ineffective in presenting the defenses petitioner claims he should have presented because: (1) selection of a defense is a strategic decision seldom reevaluated; (2) the landlord-tenant defense was not available to petitioner; and (3) the jury instructions sufficiently advised jurors of a legal option similar to what a claim of right defense would have allowed. *Lodermeier II*, 555 N.W.2d at 623. The Court finds the selection of a defense is a strategic decision which should not be second-guessed. *Payne*, 78 F.3d at 345. Moreover, petitioner has not met the burden under 28 U.S.C. § 2254(d) to justify granting his petition.

4. Sentence Based Upon Erroneous Facts

Petitioner claims trial counsel was ineffective because he failed to object to Judge Hurd's sentencing which was based on erroneous facts. Petitioner asserts in the present petition that trial counsel should have objected to the State's argument that petitioner is a dangerous person in part because of his alleged involvement in the pipe-bombing of a Sioux Falls police officer. The South Dakota Supreme Court found that trial counsel challenged the State's characterization of the petitioner as dangerous, specifically mentioning the pipe-bombing incident. *Lodermeier II*, 555 N.W.2d at 623. The South Dakota Supreme Court found that Judge Hurd gave only "token consideration" to this incident as an indication of petitioner's dangerousness and that Judge Hurd clearly based his sentence on other overarching factors. *Id.* Petitioner was an official suspect in the pipe-bombing incident. The Court does not find the adjudication of this claim by the state courts resulted in a decision contrary to, or involved an unreasonable application of, clearly established federal law or that the decision was based on an unreasonable determination of the facts. 28 U.S.C. § 2254(d).

C. Outrageous Government Conduct

Petitioner contends detectives from the Sioux Falls Police Department falsified affidavits for a search warrant and lied under oath. Petitioner contends this conduct violated his due process rights.

This issue was raised in petitioner's brief to the South Dakota Supreme Court in *Lodermeier II*, but the

court did not find it had sufficient merit to warrant discussion. 555 N.W.2d at 621. The state habeas court ruled the alleged lies by the police officers were addressed by the South Dakota Supreme Court in petitioner's direct appeal and therefore, under the doctrine of res judicata, the court could not consider such allegations in petitioner's habeas petition. *See Lodermeier v. State*, No. 19444, South Dakota Supreme Court, at p. 469. On direct appeal, the South Dakota Supreme Court resolved the issue of whether the police officers lied under oath against petitioner. *Lodermeier I*, 481 N.W.2d at 621-23.

As to the allegation that witnesses were intimidated, the state habeas court found petitioner failed to produce credible evidence that either the prosecuting attorney or police officers made threats to witnesses or potential witnesses. *Lodermeier v. State*, No. 19444, South Dakota Supreme Court, at p. 492.

The factual issues regarding the governmental officials' conduct were adjudicated on the merits in the state court proceedings and the state courts' findings are presumed to be correct. 28 U.S.C. § 2254(e)(1). Petitioner disagrees with credibility determinations made by the state courts but such disagreements are not sufficient to rebut the presumption of correctness by clear and convincing evidence.

"To prevent prosecution [on the basis of outrageous government conduct], the government's conduct must violate 'that "fundamental fairness, shocking to the universal sense of justice," mandated by the Due Process Clause of the Fifth Amendment.' " *United States v. Ford*, 918 F.2d 1343, 1349 (8th Cir. 1990) (*quoting, United States v.*

Russell, 411 U.S. 423, 432 (1973) (*quoting*, *Kinsella v. United States ex rel. Singleton*, 361 U.S. 234, 236 (1960))). Accepting the factual findings by the state courts regarding the credibility of the Sioux Falls police officers involved in this case, the government's conduct did not amount to outrageous government conduct violating petitioner's right to due process of law.

D. Disclosure of Confidential Informant

Petitioner contends the State's failure to disclose the name of the confidential informant in petitioner's criminal cases violated his right to due process of law under the Fourteenth Amendment. Petitioner contends the testimony of the informant, Dean Johnson, provided during the state habeas proceedings was exculpatory in nature and tended to impeach State witnesses.

On direct appeal, the South Dakota Supreme Court determined it was apparent "prior to trial the informant's identity was well known to Lodermeier." *Lodermeier I*, 481 N.W.2d at 627. This factual finding is presumed correct. 28 U.S.C. § 2254(e)(1). Upon reviewing the record and petitioner's arguments on this issue, the Court concludes petitioner has failed to rebut the presumption of correctness by clear and convincing evidence. *Id.*

"There is no absolute rule requiring disclosure [of a confidential informant's identity] . . . and disclosure is not required where [] the defendant already knows the informant's identity." *United States v. Johnson*, 892 F.2d 707, 709-710 (8th Cir. 1989) (citations omitted). Because

petitioner knew the informant's identity in this case, disclosure by the State was not required, and petitioner's right to due process of law was not violated.

E. Trial Judge's Actual Bias

Petitioner contends his due process rights were violated because Judge Hurd made several comments which indicated Judge Hurd was not acting as a neutral decision maker. The South Dakota Supreme Court adjudicated this issue on the merits in *Lodermeier II*, holding that petitioner's due process rights were not violated by any alleged bias on the part of Judge Hurd. 555 N.W.2d at 626-28

"A fair trial in a fair tribunal is a basic requirement of due process." *In re Murchison*, 348 U.S. 133, 136 (1955).

The Supreme Court held that "[n]ot all unfavorable disposition towards an individual (or his case) is properly described by th[e] terms [bias or prejudice]." *Liteky v. United States*, 510 U.S. 540, 555 (1994). Rather, "[t]he words connote a favorable or unfavorable disposition or opinion that is somehow wrongful or inappropriate, either because it is undeserved, or because it rests upon knowledge that the subject ought not to possess . . . , or because it is excessive in degree. . . . " *Id.* "[O]pinions formed . . . on the basis of facts introduced or events occurring in the course of the current proceedings, or of prior proceedings, do not constitute a basis for a bias or partiality motion unless they display a deep-seated favoritism or antagonism that would make fair judgment impossible." *Id.* The Court concludes the comments complained of by petitioner do not display a deep-seated

favoritism toward the State or antagonism toward petitioner that would have made fair judgment impossible by Judge Hurd. Having reviewed the record and all arguments regarding bias on the part of Judge Hurd, the Court concludes, the adjudication of this claim did not result in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law or that was based on an unreasonable determination of the facts in light of the evidence presented in the state court proceedings. 28 U.S.C. § 2254(d).

F. Failure to Allege Essential Element in Indictment

Petitioner contends the three indictments which charged him with illegally possessing stolen property with altered serial numbers failed to allege an essential element of the crime, to wit, the removal was done "without the consent of the owner" as defined in SDCL § 22-11-27, thereby violating the Sixth Amendment.

A defendant's Sixth Amendment "'right to reasonable notice of the charge against him . . . is incorporated in the Fourteenth Amendment to the United States Constitution and thus cannot be abridged by the states.' " *Franklin v. White*, 803 F.2d 416, 417 (8th Cir. 1986) (per curiam) (*quoting*, *Goodloe v. Parratt*, 605 F.2d 1041, 1045 (8th Cir. 1979)), *cert. denied*, 481 U.S. 1020 (1987). "However, the states are not bound by the technical rules governing federal criminal prosecutions; the crucial question in state prosecutions is whether the defendant had sufficient notice of the potential charges against him that he could prepare to contest those charges." *Blair v. Armontrout*, 916 F.2d 1310, 1329 (8th Cir. 1990) (citations

omitted), *cert. denied*, 502 U.S. 825 (1991). "Due Process requirements may be satisfied if a defendant receives actual notice of the charges against him, even if the indictment or information is deficient." *Hulstine v. Morris*, 819 F.2d 861, 864 (8th Cir. 1987), *cert. denied*, 484 U.S. 1068 (1988).

It is clear in this case petitioner had sufficient notice of the charges against him. Petitioner filed a pretrial motion contending the indictment was defective for omitting the element of non-consent by the owner. *See Lodermeier I*, 481 N.W.2d at 619. The Court concludes petitioner's Sixth Amendment rights were not violated because petitioner's knowledge of the statute with which he was accused of violating provided him sufficient notice of the charges against him to allow him to prepare to contest those charges. *See Blair*, 916 F.2d at 1329.

Now, therefore,

IT IS ORDERED:

(1) That petitioner's Motion for Evidentiary Hearing, Doc. 16, is denied.

(2) That petitioner's Petition for Writ of Habeas Corpus pursuant to 28 U.S.C. 2254, Doc. 1, is denied with prejudice.

Dated this 12th day of January, 1999.

BY THE COURT:

/s/ John B. Jones
Senior U.S. District Judge

ATTEST:

JOSEPH HAAS, CLERK

BY: /s/ Jackie Meisenheimer
DEPUTY

(SEAL)

#19444-a-JKK

1996 SD 134

IN THE SUPREME COURT
OF THE
STATE OF SOUTH DAKOTA

* * *

GENE VERNAL LODERMEIER, — Petitioner and Appellant,

v.

JOE CLASS, Warden for the South Dakota State Penitentiary, — Appellee.

* * *

APPEAL FROM THE CIRCUIT COURT OF THE SECOND JUDICIAL CIRCUIT MINNEHAHA COUNTY, SOUTH DAKOTA

* * *

THE HONORABLE JUDITH K. MEIERHENRY
Judge

* * *

DAVID M. HOSMER of Hosmer & Kettering
Yankton, South Dakota — Attorney for petitioner and appellant.

MARK BARNETT
Attorney General

TODD A. LOVE
Assistant Attorney General
Pierre, South Dakota — Attorneys for appellee.

* * *

CONSIDERED ON BRIEFS
ON SEPTEMBER 12, 1996

OPINION FILED **11/13/96**

KONENKAMP, Justice.

[¶1] Gene Lodermeier appeals the denial of his application for writ of habeas corpus. We affirm.

BACKGROUND

[¶2] Lodermeier was convicted by a jury on October 26, 1988, of three counts of possession of stolen property and three counts of possession of property with altered serial numbers. He was sentenced to forty-five years in the South Dakota State Penitentiary. We affirmed on direct appeal. *State v. Lodermeier*, 481 N.W.2d 614 (S.D. 1992). The facts on the present matter will be discussed to the extent necessary to resolve the issues. Although *Lodermeier* raised one hundred seven issues before the habeas court and now maintains thirteen issues on appeal, we find only six have sufficient merit for discussion:

I. Whether the trial court had jurisdiction.

II. Whether Lodermeier's trial counsel was ineffective.

III. Whether SDCL 22-11-27 is unconstitutionally vague.

IV. Whether issues raised before the habeas court were improperly dismissed as res judicata.

V. Whether the trial judge's purported bias affected his rights.

VI. Whether charges against Lodermeier were improperly joined.

ANALYSIS

[¶3] Our standard of review for a habeas corpus appeal is firmly established:

> Habeas corpus is not a substitute for direct review. Because habeas corpus is a collateral attack upon a final judgment, our scope of review is limited. On habeas review, the petitioner has the initial burden of proof. We review the habeas court's factual findings under the clearly erroneous standard.
>
> > Habeas corpus can be used only to review (1) whether the court had jurisdiction of the crime and the person of the defendant; (2) whether the sentence was authorized by law; and (3) in certain cases whether an incarcerated defendant has been deprived of basic constitutional rights.

Loop v. Class, 1996 SD 107, ¶ 11 (citing *Two Eagle v. Leapley*, 522 N.W.2d 765, 767 (S.D. 1994) (citations omitted)).

[¶4]I. Jurisdiction

[¶5] Lodermeier informally requested Judge Gene Paul Kean to recuse himself. Judge Kean agreed and the late Judge R.D. Hurd eventually took the assignment.[1] SDCL 15-12-21.1 provides in part:

> Prior to filing an affidavit for change of judge, the party or his attorney shall informally request the judge or magistrate who, in the ordinary course, would preside at the hearing or trial, to disqualify himself. . . . If the judge or

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[1] Judge Hurd died May 1, 1995.

> magistrate grants the request, he shall forthwith notify the presiding judge, who shall assign the case to some other judge or magistrate. . . .

No written order assigning Judge Hurd was ever filed with the clerk of courts. Without an order, Lodermeier asserts Judge Hurd never acquired jurisdiction and thus all subsequent proceedings are void. In *State v. Baldwin*, 299 N.W.2d 820 (S.D. 1980), this Court interpreted SDCL 15-12-32, which provides in part:

> The presiding judge . . . of the circuit shall review the affidavit . . . [and] shall assign some other circuit judge or magistrate of that circuit . . . by filing an order of such appointment with the clerk of the court of the county wherein said action is pending. From the filing of such order the judge or magistrate therein designated shall have full power, authority and jurisdiction to proceed in the matter.

Id. at 821. A formal order under SDCL 15-12-32 is an obvious prerequisite to jurisdiction as it provides, "From the filing of such order the judge or magistrate therein designated shall have full power, authority and jurisdiction to proceed in the matter." *Baldwin*, 299 N.W.2d at 821; *see also State v. Peterson*, 531 N.W.2d 581 (S.D. 1995) (conviction and judgment reversed and remanded for new trial where affidavit for removal denied on review by sitting judge, rather than presiding judge).

[¶6] Here the affidavit procedure was inapplicable because the informal procedure of SDCL 15-12-21.1 was used. This method averts the technical niceties of removal by affidavit found in SDCL 15-12-32. Explicit language in

SDCL 15-12-32 requires an order be filed before jurisdiction vests, whereas no such requirement is found in SDCL 15-12-21.1. Lodermeier asked and Judge Kean agreed to voluntarily disqualify himself. No formal order was required to assign a new judge.

[¶7]II. Ineffective Assistance of Counsel

[¶8] Our standard for evaluating claims of ineffective assistance of counsel derives from the two-part test enunciated in *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984).

> To reverse a conviction on ineffective assistance grounds, a [petitioner] must show: (1) that counsel's performance was deficient; and (2) that the deficient performance prejudiced the defense. The test for prejudice is whether there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceedings would have been different.

Boykin v. Leapley, 471 N.W.2d 165, 167 (S.D. 1991).

> Whether a defendant has received ineffective assistance of counsel is essentially a mixed question of law and fact. In the absence of a clearly erroneous determination by the circuit court, we must defer to its findings on such primary facts regarding what defense counsel did or did not do in preparation for trial and in his presentation of the defense at trial. This court, however, may substitute its own judgment for that of the circuit court as to whether defense counsel's actions or inactions constituted ineffective assistance of counsel.

Loop, 1996 SD 107, ¶ 11 (quoting *Aliberti v. Solem*, 428 N.W.2d 638, 640 (S.D. 1988)).

[¶9] **A. Sentencing**

[¶10] Lodermeier claims his counsel was ineffective at sentencing because he failed to object to allegedly inaccurate facts the prosecutor advanced at sentencing. Specifically, he asserts that his trial counsel allowed the judge to erroneously rely on information regarding Lodermeier's alleged involvement in the disappearance of Lodermeier's wife and in the pipe-bombing of a Sioux Falls police officer's car. In his comments at sentencing, however, Lodermeier's trial counsel challenged the State's characterization of the defendant, specifically mentioning unindicted bad acts ascribed to Lodermeier. As such, we cannot say that this was ineffective assistance. Even if counsel had protested with a zest more to Lodermeier's liking, it would have been of little consequence, as Judge Hurd noted during sentencing that he gave no weight to the allegation regarding the death of Lodermeier's wife. As an indication of his dangerousness, he gave token consideration to the pipe-bombing incident, since Lodermeier was an official suspect. Nevertheless, Judge Hurd clearly based his sentence on other overarching factors.[2]

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[2] These factors included Lodermeier's twenty-year criminal history, lack of remorse, attempted fabrication of evidence, retaliatory destruction of private property and his taking preliminary steps to have witnesses killed, steps which were not successful. Judge Hurd stated on the record that there was insufficient evidence to charge Lodermeier with the pipe

[¶11] **B. Improper Defenses**

[¶12] Lodermeier asserts his trial counsel was ineffective by failing to advance available defenses under landlord-tenant statutes: as a "landlord" he was entitled to seize allegedly stolen property the tenant abandoned. Selection of a defense is a trial strategy this Court will seldom reevaluate. *Fast Horse v. Leapley*, 521 N.W.2d 102, 106 (S.D. 1994). In any event, failure to assert a defense on the basis of the landlord-tenant statutes was not ineffective assistance in this case, as the statute in question, SDCL 43-32-26, relates to residential leases.[3] The property Lodermeier would have us apply this statute to was left on commercial premises formerly occupied by Lodermeier and his business partner.

[¶13] Further, Lodermeier asserts his attorney was ineffective in failing to offer a claim of right defense; this would have possibly negated the state of mind element in the charges for possession of stolen property. A jury instruction on mistake of fact was given, which read, in part, "Where a person honestly and reasonably believes certain facts, and acts or fails to act based upon a belief in those facts, which, if true, would not result in the commission of a crime, the person is not guilty." This advised

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bombing, so he obviously was not acting under any misconception about the significance of the incident.

[3] The statute provides, in part, "the property of a lessee . . . left on leased *residential* premises by the lessee after the lessee has quit the premises shall be stored by the lessor. . . . After storing the property for thirty days or more the lessor may treat the property as abandoned and dispose of it." (emphasis added).

jurors of a legal option similar to what a claim of right defense would have allowed, permitting them to find for *Lodermeier* on the state of mind element, if the evidence justified it. Therefore, we find no ineffective assistance here.

[¶14] **C. Prosecutorial Misconduct**

[¶15] Lodermeier contends his trial counsel was ineffective for failing to object to behavior by the State which amounted to prosecutorial misconduct. First, Lodermeier argues the State violated the trial court's in limine order preventing the State from referring to Lodermeier's prior federal conviction. The trial court ruled:

> I have performed the balancing test. I have concluded to allow the State to elicit that the defendant was convicted of a felony in [the] U.S. District Court for the District of South Dakota and when that conviction occurred is more probative than prejudicial on the issue of impeachment of credibility and should be allowed. The nature of the conviction, what the nature of the conviction was for, or any of the specifics surrounding the conviction are more prejudicial than probative and they may not go into those.

In response to the State's inquiry concerning the scope of this ruling, the trial court responded, "I don't want it brought out that the defendant's ever been in the penitentiary, convicted of anything, unless he testifies." Lodermeier argues the State's opening statement violated the in limine order. However, the State simply mentioned a date on which law enforcement found Lodermeier in possession of a stolen Case 580 backhoe (the subject of the

federal conviction) and described the circumstances surrounding it, without mentioning the conviction itself.[4] Judge Hurd had ruled that while the conviction itself could not be disclosed, the State would be allowed to present evidence that the stolen backhoe was in Lodermeier's possession and the serial numbers had been removed. We fail to see any prosecutorial misconduct, so failure to object cannot constitute ineffective assistance.

[¶16] Lodermeier also contends his trial counsel failed to properly object to testimony of certain State witnesses concerning the prior federal conviction. Although trial counsel did object to the comments on the basis of SDCL 19-12-3 (Rule 403 – balancing test) and SDCL 19-12-5 (Rule 404 – other bad acts), Lodermeier argues counsel erred in not objecting on the basis of a violation of the in limine order. The underlying basis for the in limine order was the trial court's balancing of the prior conviction's

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[4] The portion of the State's opening statement which Lodermeier finds objectionable:

> The State will seek to introduce evidence that the defendant on June 19, 1984, was found to be in possession of stolen property, [a] Case 580 backhoe. The State's evidence will show that the defendant at that time, June 21, 1984, about two weeks prior to the dates of theft of the big Bobcat in Brookings, and the lawn and garden tractor in Elk Point, was found in possession of this backhoe. The officers who found him, [a] highway patrolman and a deputy sheriff were paying enough attention that an identifying decal, dealer decal plate which had been adhesively applied to the backhoe – when those two officers noticed that missing dealer label they immediately looked for it and found that decal in the left front pants pocket of the defendant.

probative value against its possible prejudice to Lodermeier and whether the prior conviction was admissible to show proof of intent, plan, or absence of mistake. *See* SDCL 19-12-5. Clearly, trial counsel's objections were sufficient to preserve the issue for direct appeal, precluding review in this habeas corpus action.[5] *Miller v. Leapley*, 472 N.W.2d 517, 518 (S.D. 1991). Hence, we find that trial counsel properly objected, and there is no basis for an ineffective assistance of counsel claim.

[¶17] Lodermeier also asserts trial counsel failed to object to alleged vouching by the State. During its closing argument, the State argued, "She's [State witness] not the kind of young lady that is going to come in and lie. She really has no reason to come in here and lie to you about that." In *State v. Goodroad*, we found the State improperly vouched for a witness when the prosecutor stated the witness was staking his freedom on the truth due to a plea agreement entered into with the State. 455 N.W.2d 591, 594-95 (S.D. 1990). Yet in this instance the prosecutor's remarks did not suggest he had some superior knowledge or criterion, not available to the jury, to establish the witness was testifying truthfully. The remarks were fair comment inviting the jury to simply behold the witness as being a person who would not lie, with no apparent bias against Lodermeier. Further, Lodermeier has not shown how the outcome of his trial was affected by trial counsel's failure to object; he has shown no prejudice.

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[5] Considerations on the admissibility of the prior conviction were previously addressed by this Court on direct appeal. *Lodermeier*, 481 N.W.2d at 625-26.

[¶18] Last, Lodermeier contends his trial counsel's failure to object to comments made by the State concerning the burden of proof permeated the entire trial to such an extent that his conviction requires reversal. He highlights several comments made by the State during closing argument about defense theories, interpretation of evidence, and failure to call witnesses. Initially, we have held that counsel are "allowed considerable latitude in argument and have the right to comment upon matters supported by evidence." *State v. Burtts*, 81 S.D. 150, 157, 132 N.W.2d 209, 212 (1964). *See also State v. Gassler*, 505 N.W.2d 62 (Minn. 1993) (holding it is permissible for the State to remark that a defendant has not proven a theory of defense as promised). "We have consistently approved of statements alluding to the fact that the accused has failed to produce other witnesses or evidence." *State v. Rosales*, 302 N.W.2d 804, 806 (S.D. 1981). It should be noted that all the comments Lodermeier objects to were made during the State's closing argument, immediately after the judge had instructed the jury on the State's burden to prove the case beyond a reasonable doubt. Lodermeier's trial counsel, in his closing argument, made repeated reference to this standard. Therefore, any of the State's comments that may have appeared to shift the burden would have had little or no impact, given the fact that the trial court's instructions and the comments of Lodermeier's counsel were fresh in the jurors' minds. Given these facts, we cannot say that trial counsel's lack of objections during the State's closing argument constituted ineffective assistance.

[¶19] **D. Failure to Present Witnesses**

[¶20] Lodermeier contends counsel was ineffective for failure to call certain witnesses. Failure to call a witness will not automatically produce ineffective assistance of counsel. *Garritsen v. Leapley*, 541 N.W.2d 89, 94 (S.D. 1995). Lodermeier argues that Meryle Lodermeier, his mother, and Cleda Gerhart should have been called to testify at his trial. Counsel made a decision to call neither of these two witnesses due to credibility concerns. Moreover, much of Cleda Gerhart's alleged testimony was in the form of inadmissible hearsay and was likely to have been contradicted by her prior testimony at a grand jury hearing. Our review of the habeas proceeding denotes trial counsel had a sound basis for his decision to not call them as witnesses; counsel's trial strategy was not ineffective.

[¶21]**III. Vagueness**

[¶22] In certain instances, habeas will lie to consider a challenge to the constitutionality of a statute under which a person was prosecuted. *In re Painter*, 85 S.D. 156, 158, 179 N.W.2d 12, 13 (1970) (citing *Wangsness v. McAlpine*, 47 S.D. 472, 199 N.W. 478 (1924)). Lodermeier contends SDCL 22-11-27 is unconstitutionally vague because persons of common intelligence might interpret the statute differently and law enforcement may be able to enforce the statute selectively. He also argues that because of its vagueness, jurors were "free to decide crucial issues upon their own notions of what the law should be instead of what it is," hence preventing him from receiving a fair trial. We recently reiterated:

> A crime must be statutorily defined with definiteness and certainty. A statute which either forbids or requires the doing of an act in terms so vague that [people] of common intelligence must necessarily guess at its meaning and differ as to its application violates the first essential of due process. A criminal statute must give a person of ordinary intelligence fair notice [of what] conduct is forbidden.

State v. Hauge, 1996 SD 48, ¶ 12, 547 N.W.2d 173, 177 (citations and quotations omitted). SDCL 22-11-27 provides:

> Any person who, without consent of the owner, intentionally alters, obliterates or removes a serial number or other identifying mark on personal property, or knowingly possesses any personal property having a serial number or identifying mark which has been intentionally obliterated, altered, or removed, which number or marking may be used to determine ownership thereof, is guilty of a Class 6 felony.

Lodermeier must overcome a strong presumption of constitutionality:

> [T]he laws enacted by the legislature are [presumed] constitutional and the presumption is rebutted only when it clearly, palpably and plainly appears that the statute violates a provision of the constitution. Further, the party challenging the constitutionality of a statute bears the burden of proving beyond a reasonable doubt that the statute violates a state or federal constitutional provision.

Hauge, 1996 SD 48, ¶ 4, 547 N.W.2d at 175 (citations and quotations omitted). Our review of SDCL 22-11-27 and

the specific jury instructions explaining this statute do not convince us that Lodermeier has overcome his burden to show evident unconstitutional vagueness, or that he was deprived of his right to a fair trial.

[¶23] **IV. Res Judicata**

[¶24] Lodermeier contends the State withheld the name of an informant who had material information which was not available on direct appeal on whether search and seizure of certain evidence was proper. He argues he was not given a full and fair opportunity to litigate his motion for new trial on this issue. *See Lodermeier*, 481 N.W.2d at 621-25. A habeas court cannot, however, review issues previously decided by this Court on direct appeal. *Miller*, 472 N.W.2d at 519. Res judicata bars the reexamination of those issues *substantially raised* in the petitioner's direct appeal. *Id.* (emphasis added). Among other subjects, the trial court found Lodermeier's arguments concerning defective indictments, the statute of limitations, search and seizure, and a motion for new trial were simply recast in this habeas action in an attempt to present additional evidence on substantially the same matters presented on direct appeal. *See Lodermeier*, 481 N.W.2d at 617-28. We agree. The issues raised here are precisely the type of assertions res judicata precludes in a habeas corpus proceeding.

[¶25] **V. Trial Judge's Bias**

[¶26] Lodermeier asserts that Judge Hurd's bias during the proceedings denied him due process of law. *See Scott v. Class*, 532 N.W.2d 399, 404-05 (S.D. 1995) (habeas court

examined whether due process was denied because of trial court's bias). He also claims, as a part of his ineffective assistance argument, that it was error for his trial counsel to advise him to sign two waivers allowing Judge Hurd to remain on the case, despite allegations that Lodermeier had ordered the judge put on a "hit list." We shall treat these issues together in a general discussion of alleged prejudice or bias on the part of Judge Hurd and the involvement of Lodermeier's trial counsel.

[¶27] Foremost, we have held that "only personal bias or prejudice [by a trial judge], as distinguished from judicial predilection, constitutes a disqualifying factor." *State v. Lohnes*, 432 N.W.2d 77, 83 (S.D. 1988) (citing *State v. Smith*, 242 N.W.2d 320, 324 (Iowa 1976)). This actual bias must come from an extrajudicial source, which means the judge's rulings were based on something learned other than at trial. *Lohnes*, 432 N.W.2d at 83. *Accord State v. Farni*, 325 N.W.2d 107, 110 (Iowa 1982).[6]

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[6] Lodermeier also asserts that, to satisfy due process concerns, there must be not only no actual bias, but no implied bias as well. *In re Murchison*, 349 U.S. 133, 75 S.Ct. 623, 99 L.Ed. 942 (1955). However, the factual scenarios in the Supreme Court cases he cites are much more egregious than any bias alleged in this case. *See, e.g., Id.* (holding implied bias existed when the same judge acted both as a one-man grand jury and as the trial judge); *Taylor v. Hayes*, 418 U.S. 488, 94 S.Ct. 2697, 41 L.Ed.2d 897 (1974) (a continual display of unfavorable personal attitude by the judge towards the petitioner warranted contempt sanctions against the petitioner be tried by a different judge); *Johnson v. Mississippi*, 403 U.S. 212, 91 S.Ct. 1778, 29 L.Ed.2d 423 (1971) (holding trial judge was so personally opposed to the civil rights movement that he could not give the petitioner a fair trial). As such, we find this argument inapplicable and will continue to consider the rest of the facts under an actual bias standard.

Such bias will be judged by a reasonable person standard, *McKinley v. Iowa Dist. Court for Polk Cty.*, 542 N.W.2d 822, 827 (Iowa 1996), but a judge's decision to stay on a case will be affirmed unless there is bias or prejudice shown as a matter of law. *Lohnes*, 432 N.W.2d at 83; *State v. Shepard*, 477 N.W.2d 567, 571 (Neb. 1991) (holding there is a heavy burden to overcome a presumption of judicial impartiality).

[¶28] At several points in the proceedings, Lodermeier asserts Judge Hurd evinced a bias against him. First, there was discussion during a suppression hearing about Lodermeier's propensity to deal in stolen property. We do not find actual, extrajudicial bias in the record, however, as the discussion centered around the Sioux Falls police officer's probable cause to search the stolen property located in Lodermeier's driveway. Further, Lodermeier complains that at a bond hearing before trial, Judge Hurd commented on the strength of the evidence presented by the State. This was also permissible discussion that does not prove bias, as SDCL 23A-43-4 provides that a factor to be considered on whether to release an accused is "the weight of the evidence against the defendant." *See also People v. Combs*, 505 N.W.2d 208, 212 (Mich. 1993) (holding, "A judge's candid statement of how a case appears at an early stage of the proceedings does not prevent the judge from deciding the case in a fair and evenhanded manner later, when additional facts become known").

[¶29] Lodermeier also asserts that allegations regarding his involvement in the disappearance of his wife and a pipe-bombing incident were relied on by Judge Hurd during sentencing. As discussed earlier, Judge Hurd did

not base his sentence on information regarding Lodermeier's wife and only considered the fact that he was a "suspect" in the pipe-bombing incident as one of many factors, including Lodermeier's tampering with evidence, perjury, federal conviction, nascent plot to kill witnesses and past destruction of private property. No bias has been shown regarding these comments.

[¶30] Finally, Lodermeier contends the Judge's bias revealed itself when Judge Hurd mentioned the matter of his own name being on the "hit list" at sentencing. Notwithstanding that Lodermeier twice signed waivers expressly submitting to Judge Hurd's jurisdiction despite the hit list controversy, he now argues this situation created untenable bias. He believes no criminal defendant should be called upon to waive such bias, regardless of counsel's advice. Yet his trial attorney, John Schlimgen, discussed with Lodermeier the virtues of keeping Judge Hurd on the case, and decided he should remain. A person uninitiated in the criminal justice system might have some reason to complain, but Lodermeier was no novice in the courts. He had been immersed in the system, both federal and state, for many years. We conclude these waivers constituted reasonably justifiable strategy made by an experienced trial attorney and knowingly assented to by Lodermeier. Judge Hurd's legal acumen and reputation for objectivity was widely known and respected. Wise counsel, and heedful client, would have carefully weighed the alternatives before seeking his removal.

[¶31] Nonetheless, Lodermeier asks us to adopt a rule requiring disqualification whenever a defendant's name may be linked with a threat against a judge presiding in

the matter. This Court has not yet had the opportunity to consider such a case, although other courts have, reaching varying results. *See United States v. Cerrella*, 529 F.Supp. 1373 (S.D.Fla.1982) (holding a reasonable person would doubt the impartiality of a judge who had a death threat made against him by the defendant); *Wilks v. Israel*, 478 F.Supp. 404 (E.D.Wis.1979) (noting that a judge was not biased by an extrajudicial source even when the defendant physically attacked the judge in the courtroom); *aff'd*, 627 F.2d 32 (7th Cir.1980); *Smith v. Dist. Ct. for Fourth Judicial Dist.*, 629 P.2d 1055 (Colo.1981) (holding no bias existed in sentencing, even though the defendant threatened to kill the judge). *See also* Richard D. Tinney, J.D., *Disqualification of Judge Because Assault or Threat Against Him by Party or Person Associated With Party*, 25 A.L.R.4th 923 (1983).

[¶32] The 10th Circuit Court of Appeals recently considered a similar case, *United States v. Greenspan*, 26 F.3d 1001 (10th Cir.1994), in which the FBI notified the trial judge that the defendant had taken substantial steps to carry out a threat to kill the judge or the judge's family. Given this information, the judge accelerated the sentencing phase and would not grant a continuance to defendant's counsel, even though he had been appointed only two days earlier. *Id.* at 1006. Additionally, the threat was not delivered during any proceedings in court; therefore, it was extrajudicial. These particulars, in addition to the fact that the defendant was not "judge-shopping" or manufacturing a threat to obtain a recusal, led the court to hold that a reasonable person would believe the judge was not impartial. *Id.* at 1007.

[¶33] Even considering *Greenspan* as merely instructive, without embracing its holding, applying a "totality of the circumstances" approach here would not lead a reasonable person to question Judge Hurd's impartiality.[7] Judge Hurd at sentencing gave little credence to the hit list: he remarked that he believed the idea of putting his name on it was broached by Lodermeier's girlfriend, who was angry with him over a custody decision, but that the "hit" never advanced beyond mere talk. In fact, he said, "I don't believe that this defendant had any motivation [to have me killed] . . . And if every time anybody had walked out of my courtroom mad enough to cause me harm, well, I suppose that is not an unusual occurrence. It goes with the territory." Judge Hurd declined to impose the maximum sentence of sixty years recommended by the State, a sentence a habitual offender such as Lodermeier could have merited. Our review of Judge Hurd's rulings exposes neither favoritism toward the State nor bias against Lodermeier. As such, we determine no due process rights were violated and, given all the circumstances, a reasonable person would not conclude Judge Hurd was biased.

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[7] The court wrote:

> Although any one of these actions [the accelerated sentencing and the refusal to grant a continuance] standing alone would not provide sufficient reason to believe a judge was biased against a defendant, when considered in light of the judge's knowledge of the alleged threats against him, these factors might provide further bases for questioning the court's impartiality.

Greenspan, 26 F.3d at 1006.

[¶34] **VI. Joinder**

[¶35] Joinders that affect substantial rights and result in actual prejudice may violate a defendant's right to a fair trial. *State v. Sabers*, 442 N.W.2d 259, 263 (S.D. 1989). Although the trial judge may allow the joinder of several offenses when the offenses are of the same or similar character, Lodermeier argues the charges were improperly joined, substantially affecting his fundamental rights. Habeas may be an appropriate remedy under these circumstances. *Aliberti*, 428 N.W.2d at 639; *Satter v. Solem*, 422 N.W.2d 425, 427 (S.D. 1988) (*Satter II*); *Everitt v. Solem*, 412 N.W.2d 119, 120-21 (S.D. 1987); *Podoll v. Solem*, 408 N.W.2d 759, 760 (S.D. 1987); *Goodroad v. Solem*, 406 N.W.2d 141, 142 (S.D. 1987); *Loop v. Solem*, 398 N.W.2d 140, 143 (S.D. 1986); *In re Williams*, 86 S.D. 208, 210, 193 N.W.2d 793, 794 (1972); *In re Kiser*, 83 S.D. 272, 283, 158 N.W.2d 596, 602 (1968); *State ex rel. Burns v. Erickson*, 80 S.D. 639, 645, 129 N.W.2d 712, 715 (1964); *State ex rel. Anderson v. Jameson*, 51 S.D. 540, 545, 215 N.W. 697, 699 (1927).

[¶36] SDCL 23A-6-23 provides:

> Two or more offenses may be charged in the same indictment or information in separate counts for each offense, if the offenses charged, whether felonies or misdemeanors or both, are of the same or similar character or are based on the same act or transaction or on two or more acts or transactions connected together or constituting parts of a common scheme or plan.

Lodermeier contends the crimes for which he was ultimately convicted occurred over a seven year period and "fly in the face of what constitute 'similar crimes.' " What

Lodermeier fails to appreciate is that he was not charged with the actual theft of the three pieces of property, but instead was charged with possession of stolen property and possession of property with altered serial numbers. All the acts of *possession* took place within a reasonably short period of time and all had a common link – the serial numbers were altered or removed. Lodermeier has failed to show how the trial court's joinder substantially affected his right to a fair trial. We find no error by the habeas court in denying his claim under this issue.

[¶37] Other issues raised by Lodermeier include police misconduct charges; an Eighth Amendment claim of improper medical care; denials of compulsory process; a denial of right to a speedy trial and appeal; improper bond denial; impropriety in grand jury proceedings; and a claim the circuit presiding judge violated his due process rights. These lack sufficient merit for discussion as they are controlled by settled law.

[¶38] Affirmed.

[¶39] MILLER, Chief Justice, and SABERS, AMUNDSON, and GILBERTSON, Justices, concur.

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 99-1653SDSF

Gene Vernal Lodermeier, Appellant,	*	Appeal from the United States District Court for the District of South Dakota
vs.	*	
Robert Dooley, Warden for the Springfield Correctional Facility, Appellee.	*	

JUDGMENT

(Filed Dec. 6, 1999)

This appeal from the United States District Court was submitted on the record of the district court and briefs of the parties.

After consideration, it is hereby ordered and adjudged that the judgment of the district court in this cause is affirmed in accordance with the opinion of this Court.

(5172-010199)

October 22, 1999

A true copy.

ATTEST: /s/ Michael E. Gans

CLERK, U.S. COURT OF APPEALS, EIGHTH CIRCUIT.

UNITED STATES COURT OF APPEALS

FOR THE EIGHTH CIRCUIT

No. 99-1653SDSF

Gene Vernal Lodermeier, Appellant,	*	Order Denying Petition for Rehearing and for Rehearing En Banc
vs.	*	
Robert Dooley, Warden for the Springfield Correctional Facility, Appellee	*	

The petition for rehearing en banc is denied. The petition for rehearing by the panel is also denied.

(5128-0101099)

November 23, 1999

Order Entered at the Direction of the Court:

/s/ Michael E. Gans

Clerk, U.S. Court of Appeals, Eighth Circuit